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or **Fax** (571)-273-2885

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22882 7590 04/27/2006

MARTIN & FERRARO, LLP  
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Sandra L. Blackmon

(Depositor's name)

*Sandra L. Blackmon*

(Signature)

May 22, 2006

(Date)

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/090,506	02/27/2002	Gary K. Michelson	101.0054-03000	7817

TITLE OF INVENTION: MILLING INSTRUMENTATION AND METHOD FOR PREPARING A SPACE BETWEEN ADJACENT VERTEBRAL BODIES

APPLN. TYPE	SMALL ENTITY	ISSUE FEE	PUBLICATION FEE	TOTAL FEE(S) DUE	DAYS DUE
nonprovisional	NO	\$0	\$0	\$0	07/27/2006

EXAMINER	ART UNIT	CLASS-SUBCLASS
HO. UYEN T	3731	606-080000

1. Change of correspondence address or indication of "Fee Address" (37 CFR 1.363).

- ☐ Change of correspondence address (or Change of Correspondence Address form PTO/SB/122) attached.  
☐ "Fee Address" indication (or "Fee Address" Indication form PTO/SB/47; Rev 03-02 or more recent) attached. Use of a Customer Number is required.

2. For printing on the patent front page, list

- (1) the names of up to 3 registered patent attorneys or agents OR, alternatively,  
(2) the name of a single firm (having as a member a registered attorney or agent) and the names of up to 2 registered patent attorneys or agents. If no name is listed, no name will be printed.

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3. ASSIGNEE NAME AND RESIDENCE DATA TO BE PRINTED ON THE PATENT (print or type)

PLEASE NOTE: Unless an assignee is identified below, no assignee data will appear on the patent. If an assignee is identified below, the document has been filed for recordation as set forth in 37 CFR 3.11. Completion of this form is NOT a substitute for filing an assignment.

(A) NAME OF ASSIGNEE

SDGI Holdings, Inc.

(B) RESIDENCE: (CITY AND STATE OR COUNTRY)

Wilmington, Delaware

Please check the appropriate assignee category or categories (will not be printed on the patent): ☐ Individual ☒ Corporation or other private group entity ☐ Government

4a. The following fee(s) are enclosed:

- ☒ Issue Fee  
☒ Publication Fee (No small entity discount permitted)  
☐ Advance Order - # of Copies

4b. Payment of Fee(s):

- ☐ A check in the amount of the fee(s) is enclosed.  
☐ Payment by credit card. Form PTO-2038 is attached.  
☒ The Director is hereby authorized to charge the required fee(s), or credit any overpayment, to Deposit Account Number 50-3726 (enclose an extra copy of this form).

5. Change in Entity Status (from status indicated above)

- ☐ a. Applicant claims SMALL ENTITY status. See 37 CFR 1.27. ☐ b. Applicant is no longer claiming SMALL ENTITY status. See 37 CFR 1.27(g)(2).

The Director of the USPTO is requested to apply the Issue Fee and Publication Fee (if any) or to re-apply any previously paid issue fee to the application identified above. NOTE: The Issue Fee and Publication Fee (if required) will not be accepted from anyone other than the applicant, a registered attorney or agent, or the assignee or other party in interest as shown by the records of the United States Patent and Trademark Office.

Authorized Signature

*Amedeo F. Ferraro*

Date May 22, 2006

Typed or printed name

Amedeo F. Ferraro

Registration No. 37,129

This collection of information is required by 37 CFR 1.311. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Thus will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, Virginia 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450.

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**MARTIN & FERRARO, LLP**  
1925 Century Park East, 17<sup>th</sup> Floor  
Los Angeles, California 90067

Telephone  
(310) 286-9800

Facsimile  
(310) 286-2795

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**FACSIMILE TRANSMITTAL**

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**TO:****Name:** Mail Stop ISSUE FEE**Firm:** U.S. Patent & Trademark Office**Fax No.:** 571-273-2885**Subject:** U.S. Patent Application No. 10/090,506

Gary K. Michelson

Filed: February 27, 2002

MILLING INSTRUMENTATION AND METHOD FOR  
PREPARING A SPACE BETWEEN ADJACENT  
VERTEBRAL BODIES

Attorney Docket No. 101.0054-03000

Customer No. 22882

Confirmation No. 7817

**FROM:****Name:** Amedeo F. Ferraro, Esq.**Phone No.:** 310-286-9800**No. of Pages (including this):** 7**Date:** May 22, 2006**Confirmation Copy to Follow:** No

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**Message:****CERTIFICATE OF TRANSMISSION UNDER 37 CFR 1.8**

I hereby certify that the attached Submission of Issue Fee Transmittal Form, Issue Fee Transmittal (in duplicate), and copy of Decision dated April 7, 2006 are being facsimile transmitted to the U.S. Patent and Trademark Office on May 22, 2006.

  
Sandra L. Blackmon

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PATENT  
Attorney Docket No. 101.0054-03000  
Customer No. 22882

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	)	Confirmation No.: 7817
Gary K. Michelson	)	
Serial No.: 10/090,506	)	Group Art Unit: 3731
Filed: February 27, 2002	)	Examiner: Uyen Ho
For: MILLING INSTRUMENTATION	)	
AND METHOD FOR PREPARING	)	
A SPACE BETWEEN ADJACENT	)	
VERTEBRAL BODIES	)	

MS ISSUE FEE  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**SUBMISSION OF ISSUE FEE TRANSMITTAL FORM**

Submitted herewith is an Issue Fee Transmittal Form for the above-identified application. It is requested that the total amount of \$1,700.00 to cover the cost of the Issue Fee and publication fees (previously paid on March 16, 2006 along with a Petition for Revival) be applied to this submission. A copy the Decision dated April 7, 2006 granting the Petition and entry of the issue and publication fee payment is submitted herewith.

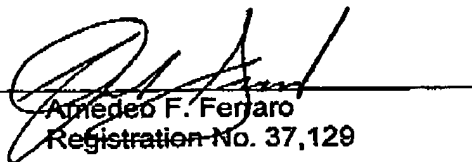
If there is any deficiency or additional fee due in connection with the filing of this submission, please charge the fee to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Date: May 22, 2006

By:

  
Amedeo F. Ferraro  
Registration No. 37,129

1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632  
Telephone: (330) 877-0700  
Facsimile: (330) 877-2030



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HARTVILLE OH 44632

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**OFFICE OF PETITIONS**  
**ON PETITION**

In re Application of  
Michelson  
Application No. 10/090,506  
Filed: 27 February, 2002  
Attorney Docket No. 101.0054-03000

This is a decision on the petition filed on 16 March, 2006, to revive the above-identified application under 37 C.F.R. §1.137(b)

For the reasons set forth below, the petition under 37 C.F.R. §1.137(b) is **GRANTED**.

### BACKGROUND

The record reflects that:

- Petitioner failed to reply timely and properly to the Notice of Allowance and Fees Due mailed on 4 October, 2005, with a reply due under a non-extendable deadline on or before 4 January, 2006;
- Petitioner's submission of fees due was made by authorization to a deposit account and at the time the transaction was attempted to be charged there were insufficient funds in the account;
- as a result, the application was deemed abandoned after midnight 4 January, 2006;
- the Office mailed the Notice of Abandonment on 21 February, 2006;

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- the instant petition (with fee authorization) filed under 37 C.F.R. §1.137(b) is accompanied by the reply in the nature of fees due and the statement of unintentional delay.

### STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).<sup>1</sup>

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.<sup>2</sup> Delays in responding properly raise the question whether delays are unavoidable.<sup>3</sup> Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).<sup>4</sup>

And the Petitioner must be diligent in attending to the matter.<sup>5</sup> Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and

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<sup>1</sup> 35 U.S.C. §133 provides:

**35 U.S.C. §133 Time for prosecuting application.**

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

<sup>2</sup> Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

<sup>3</sup> See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

<sup>4</sup> See: *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'n Pats. 1989).

<sup>5</sup> See: *Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment*, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

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regulatory requirements of unavoidable delay, and also, by definition, are not intentional.<sup>6</sup>))

As to the Allegation  
of Unintentional Delay

The requirements for a grantable petition under 37 C.F.R. §1.137(b) are the petition and fee, a statement/showing of unintentional delay, a proper reply, and—where appropriate—a terminal disclaimer and fee if the application was filed before 8 June, 1995.

Petitioner has satisfied the requirements under the regulation.

CONCLUSION

The instant petition under 37 C.F.R. §1.137(b) is granted.

The instant application is released to Publications Branch to be processed into a patent in due course.

Telephone inquiries concerning this decision may be directed to the undersigned at (571) 272-3214.



John J. Gillon, Jr.  
Senior Attorney  
Office of Petitions

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<sup>6</sup> Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared and/or deposited for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely prepared and/or deposited for shipment.